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FOR SETTLEMENT PURPOSES ONLY

December 15, 2000

Craig Melodia, Esq.
Assistant Regional Counsel
USEPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

FACSIMILE TRANSMITTAL (1-312-886-7160)

Re: John J. Whitton Trucking Company
Release of Allocator's Final Report and Preliminary Report
Relative to John J. Whitton Trucking Company

Dear Craig:

I have received authority from my client, John J. Whitton Trucking Company, to provide to you the above requested information. I am, therefore enclosing copies of the portions of the Allocator's Preliminary Allocation Report and Recommendation and Final Allocation Report and Recommendations relative to John J. Whitton Trucking Company.

My client was very hesitant to provide this information to you, as he strongly disagrees with the Allocator's Preliminary and Final Reports. This company was originally operated as a sole proprietorship from its inception through December, 1993, by John J. Whitton. Mr. Whitton died intestate in January of 1992. The business was continued by the Estate of John J. Whitton, deceased. John J. Whitton's widow was the sole beneficiary of his Estate. Mrs. Whitton formed a corporation on December 22, 1993 known as John J. Whitton Trucking, Inc. The business was then continued under this corporate entity from January 1, 1994 through August 18, 1998, as John J. Whitton Trucking, Inc., when the name was changed to Whitton Container, Inc.

Since the usage of the Skinner Landfill was prior to the incorporation date, any allocations made against John J. Whitton Trucking Company must be against the sole proprietorship and not the present corporation. We, therefore feel strongly that the corporation (the now operating entity) has a strong defense to any actions which may be brought by the United States.

Further, only construction and demolition debris was hauled to this site. There is no direct proof that my client has transported hazardous substances to this site, thereby incurring CERCLA liability.

The review of technical literature on the contents of construction and demolition debris clearly indicates that these materials are safe for landfills. My client is, therefore not responsible for the transportation and/or disposal of any hazardous substances at the Skinner Landfill site. My client does not concede that it is a "responsible party" under CERCLA, 42 U.S.C. Section 9601, et. seq., as amended by the Superfund Amendments and Reauthorization Act, or a "person" under the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. Section 6901, et. seq., with respect to the United States Environmental Protection Agency's designation as potentially responsible for the contamination at the Skinner Landfill site.

My client is in the business of providing roll-off containers for construction sites within the Southwest Ohio Region for use solely by contractors or subcontractors constructing buildings or demolishing buildings within the Region. These roll-off boxes contain strictly solid waste debris from the construction or demolition of buildings. This debris is transported to the nearest construction and demolition debris landfill. My client has not, at anytime during its existence, generated, transported, treated, or disposed of "hazardous substances" as that term is known and defined in CERCLA, nor has my client arranged for the disposal, treatment, or transportation of hazardous substances as that term is further defined in CERCLA. Furthermore, my client has ever owned or operated a hazardous waste "facility" as that term is defined in CERCLA.

I have also provided when requested by you, the confidential financial information for John J. Whitton Trucking Company. Because of the financial condition of my client, a minimal ability to pay settlement is requested. You indicated that it will be sometime in January, 2001 before we will be contacted to discuss a settlement offer.

If you have any additional questions or comments on the above or the enclosures, I shall be pleased to discuss them with you.

Very truly yours,

KEVIN J. HOPPER CO., LPA

Kevin J. Hopper

KJH/th

Enclosures

CC: John J. Whitton Trucking Company
Annette Lang, Esq. (Facsimile Transmittal)

JOHN J. WHITTON TRUCKING COMPANY ("Whitton")

Whitton was in the business of providing roll-off containers for construction sites. Whitton was in operation as a sole proprietorship run by John Whitton from 1960 - January 1992. John Whitton died intestate. Ruth Whitton operated the business as the Administratrix of the Estate of John Whitton until the business was transferred to her, doing business as John J. Whitton Trucking Company. On January 1, 1994, the business was incorporated by Ruth Whitton as the sole shareholder under the name John J. Whitton Trucking Company, Inc. (Whitton, Inc.)

Whitton Inc. reported that Whitton used the Skinner site to dispose of construction debris from November 1987 - 1990. The waste included debris from land clearing, dunnage [i.e., wood scraps, drywall cutoffs, etc.], old concrete, old masonry walls, new pipe scraps, painted wallboard, asphalt, and remodeling debris. Whitton Inc. stated that Whitton did not haul asbestos and stated that Whitton's drivers would inspect the loads before hauling to ensure that no "objectionable" material was included. Material was hauled in dumpsters ranging from 6 cy to 40 cy.

Whitton Inc. provided Whitton waste tickets that document the disposal of containers with a waste capacity of 54,037 cys. Whitton Inc. argued that 50% of the containers were filled and seeks a waste-in amount of 27,018 cys for Whitton.

Whitton Inc. does not account for Skinner log entries of June 17, 1985 ($475) and June 25, 1985 ($300) for Whitton. Whitton Inc. also does not fully account for the Skinner log entry for 1987 ($3,875); its 1987 invoices total $2,995. Plaintiffs argue that the 1985 entries require me to extrapolate Whitton's waste-in amount between these dates and November 1987 when Whitton's records begin. Whitton Inc. responds by saying it has 50,000 pages of waste tickets that demonstrate that Whitton took waste to other landfills between 1985 and 1987. To spare me the review of these records, mercifully, Whitton Inc. lists ten such landfills in its August 19, 1998 submittal and encloses several hundred landfill invoices to back up the list.

There was quite a bit of testimony about Whitton's use of the Landfill. Some of the testimony is easily reconciled with the documentary evidence. Some of the testimony results in a waste-in amount smaller than the amount shown by the documents. And some of the testimony results in an amount larger than that shown by the documents. With respect to the key question of time period of usage, I am persuaded by what I have read, but for the 1985 entries, I am going to work within the time parameters of the documents as well. I concede that additional and expensive discovery might prove that a load here or there reached the Site between 1960 and 1985. I also concede that there is testimony that would defeat a summary judgment motion by Whitton for some time periods prior to 1985 for which it does not have documentary proof of where it hauled waste. But I have taken all of this into account in my overall approach to the waste-in amount for Whitton.

I also have decided not to extrapolate Whitton's use of the Skinner site between 1985 and 1987. Again, on a full record, I might be proven wrong for making this judgment. However, I am sufficiently impressed by Whitton's records that I am not comfortable engaging in the evidentiary presumption of Site usage for the interim time period without better proof. I

note, too, that the Skinner log entries for 1985, while admittedly sparse, do include entries for the months of July and October. Whitton was not listed.

Whitton Inc. also argues that the claims bar date under Ohio's probate law applies here. It argues that under Ohio Revised Code Section 2117.06(A), all creditors, including unsecured creditors and all claimants in tort or contract, whether or not the claims are liquidated, must present their claims in writing within one year of the date of death. Failing to do so, the claim is barred.

Waste-in Amount. I am going to use Whitton Inc.'s total of 54,037 cys for the 1987 - 1990 time period but I am adding 600 cys to cover the dollar difference between the Skinner log entry and Whitton's invoice amount (I took the dollar differential of $880, treated it as representing 30 loads and assumed 20 cys per load based on the pattern shown by other 1987 waste tickets and also to be conservative). I am also adding 600 cys for 1985 to cover the $775 entries into the log (I assumed $25 per load, rounded down to 30 loads and assumed 20 cys per load). Whitton's waste-in amount is thus 55,237 cys.

As noted elsewhere, as a matter of consistency I am treating all documented loads as full loads.

Probate Code Claims Bar. While I do not regard Whitton Inc.'s argument as a fanciful one, I do not accept it for purposes of this ADR process. First, let me say that, while I appreciate the recitation by Plaintiffs of all of the times that Whitton Inc. failed to raise this defense, I still do not see legal estoppel here. The fact that Whitton Inc. did not raise the argument earlier in the ADR process admittedly means that discovery that would have been taken was not taken but, this process is non-binding and does not eliminate any legal defenses a party might have.

However, Whitton Inc. never says that it did not assume the liabilities of Whitton and I believe that a CERCLA court sitting in equity would determine that Mrs. Whitton's incorporation of her husband's business, which she ran herself for two years would result in an assumption of liabilities of the sole proprietorship. Cf. Clardy v. Sanders, 551 So.2d 1057 (Ala. 1989) (holding that a business incorporated by a sole proprietor's widow following his death, which remained substantially unchanged, assumed the liabilities of the sole proprietorship). Nor am I ruling out the likelihood that Whitton Inc. would be found to be a successor to Whitton under state law. Hence, if the claims bar argument does not succeed, Whitton Inc. would be responsible for Whitton's liabilities based on the record before me now.

I believe that the failure to give notice of the death of John Whitton and of the claims bar date defeats the argument being made by Whitton Inc. On June 21, 1991, Whitton responded to an EPA information request. Hence, it knew of its potential liability at the Site. It made no reference then to John Whitton's business structure. The response was in the name of "John J. Whitton Trucking Company," never indicating that this was a fictitious name. While the response argued, as Whitton Inc. argues here, that no hazardous substances existed in any waste taken to the Site, there is no support given for the argument in the response and there is no indication that the argument was ever accepted. Nor does the argument excuse John Whitton's estate from giving notice to EPA or, for that matter, to other PRPs who would have been easily identifiable (the Skinners, for example). See Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340 (1988) (if the identity of a creditor of an estate is known or reasonably ascertainable, due process required

actual notice to creditor that nonclaim statute had began to run). To the contrary, I fully expect that John J. Whitton Trucking Company was, during the administration of the estate, run seamlessly, as if the death of John Whitton had never occurred.

Hence, aside from CERCLA case law dealing with state probate statutes, see Steego Corp. V. Ravenal, 830 F. Sup. 42 (D. Mass. 1993) (holding that CERCLA preempts state probate code statute of limitations because the statute effectively limits liability of those Congress intended to be responsible for cleanup costs), and with cases that permit CERCLA claims to follow assets that end up in trust, see State ex. rel. Howes v. W.R. Peele, Sr. Trust, 876 F. Sup. 733, 743 (E.D. N.C. 1995) (holding that a trust, as beneficiary of decedent's estate, should be deemed to hold assets received from the estate in trust to satisfy the decedent's liabilities), I regard Whitton Inc. as responsible for the CERCLA liability of Whitton.

Whitton's Customers. I have attached as Appendix 10, a list of Whitton's customers, first in alphabetical order and then by waste-in amount, as Whitton has asked me to do. Unless I am mistaken, only one customer is a participant in this process. Consistent with what I have said elsewhere in this report, these waste-in amounts are "shared." I would assign 50% to Whitton and 50% to its customers who accept the responsibility. If they fail to do so, Whitton receives 100% of that customer's waste-in amount.

Type of Waste. Finally, I acknowledge again the arguments of sources of construction and demolition debris that their wastes do not contain hazardous substances. As I have stated generically elsewhere in this report, such debris does contain hazardous substances, as that term is broadly defined under CERCLA.

Waste-in List in Solid Waste Volume Order for the Preliminary Allocation Report and Recommendations. Skinner Landfill Superfund Site, October 6, 1998

Name Of Party	Solid Waste In Cys	Liquid Waste In Gallons	Solid Waste In Total Cys	Percentage	Liquid Waste In Total Gallons	Percentage
JOHN J WHITTON CONSTRUCTION COMPANY	54412	0	363690	14.9611%	259308	0.0000%

JOHN J. WHITTON TRUCKING COMPANY

John J. Whitton Trucking Company ("Whitton") filed a comment brief dated February 5, 1999. Whitton complained that the Allocator calculated volume based upon total volume of solid waste that went to the Site and did not made a distinction for the type of waste, or the toxicity of the waste that was taken there. Whitton stated this is "inconsistent with CERCLA and is contrary to law and the facts of this case." Since the hazardous substances such as

"chlorinated organics, benzene, pesticides, PCBs, polynuclear aromatic hydrocarbons, arsenic and cobalt" are the "driving force" for the remediation, it states the Allocator should have given a "significantly higher than pro rata share of the costs ... for those parties ... " who disposed of or arranged for the disposal of such "contaminants of concern." It notes the Allocator attempted to increase the allocation for the liquid waste haulers, while he did not "assign toxicity factors to the solid waste haulers," but treated them all equally.

I note that Whitton did not identify which parties were the sources of which wastes, but I do address the issues raised by Whitton in the main body of this Final Report.

Whitton also argued that it is inequitable to assign an allocation for demolition debris when this waste disposal was authorized by the Court of Common Pleas of Butler County, Ohio and by the actions of the Ohio EPA. I noted in the Preliminary Report that it was disturbing that much of the identifiable volume of solid waste that reached the Site did so after the Site was listed on the National Priorities List. How well known the listing was and whether companies like Whitton can be said to have assumed the risk of delivering waste to a Superfund Site would be the subject of interesting debate in the district court especially where, as was the case here, much of the waste was deposited after the Chem-Dyne district court opinion in which a joint and several liability standard was announced. United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805-10 (S.D. Ohio 1983). In any event, it is no bar to an allocation that the state court permitted disposal of construction and demolition debris. What role the Ohio EPA or the federal EPA had in permitting the continued growth of the Landfill, even while the Superfund process was ongoing, is troubling to me and would be troubling to the district court and forms, in part, a basis for the solid waste - liquid waste distinction made in the Preliminary Report.

Finally, Whitton argued that the Allocator should consider the Gore Factors and in doing so "could easily conclude that the construction and demolition debris is high volume low toxicity material." Whitton states construction debris, such as it hauled to the Site, does not significantly contribute to the response costs incurred to date at Skinner. Whitton also argued that if this were only a construction and demolition debris landfill, it would not be a Superfund site. I agree that the latter conclusion is probable, but I disagree that the delivery of construction debris to a listed Superfund site does not contribute to response costs. I do not regard the share allocated to the solid waste parties in the Preliminary Report to be "significant" even though, as Whitton has certainly noticed, the liquid waste sources argue vehemently that the solid waste sources were allocated too little.

Final Allocation Recommendations in Alphabetical Order, Skinner Landfill Superfund Site, April 12, 1999

Name Of Party	Solid Waste in Cys	Liquid Waste in Gallons	Solid Waste in Total Cys	Percentage	Liquid Waste in Total Gallons	Percentage	Solid Waste	Liquid Waste
JOHN J WHITTON CONSTRUCTION COMPANY	54402	0	372906	14.5887%	262252	0.0000%	1.46%	0.00%